Saratogoa Sdn Bhd v Pentadbir Tanah Johor Bahru

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–310–07 OF 2012
LINTON ALBERT, MOHTARUDIN BAKI JJCA AND HAMID SULTAN J
15 FEBRUARY 2013

Land Law — Forfeiture — Rent assessment — Non-payment of — Appeal against — Whether respondent could forfeit appellant's land for non-payment of rent assessment — Appellant had been wound up during forfeiture — Whether mandatory to comply s 226(3) of the Companies Act 1965 — Whether non-compliance offended fundamental guarantee afforded under art 13(1) of the Federal Constitution — National Land Code ss 97, 100, 130 & 418 — Companies Act 1965 s 233(3) — Federal Constitution art 13(1)

The subject matter herein was related to an appeal to the High Court under s 418 of the National Land Code ('NLC') against the decision of the respondent to forfeit the appellants/plaintiffs' land. It was not in dispute that: (a) the appellant was wound up on 12 April 2007; (b) a private liquidator was appointed to manage the affairs of the company; (c) the liquidator had applied for instalment payments but failed to settle the amount due on the agreed terms as stipulated by the defendant; and (d) Form 8A concerning notification of the forfeiture was duly *gazetted*. The principal ground of defence of the respondent before the High Court was that the liquidator had failed to comply with s 233(3) of the Companies Act 1965 ('Act'). In consequence, the respondent argued that it had not intentionally breached s 226(3) of the Act in exercising its statutory powers under the NLC. The issue before this court was whether the respondent could forfeit the appellant's land for non-payment of rent assessment when at the material time of forfeiture the appellant had been wound up under the Act.

Held, allowing the appeal with costs:

(1) It is trite that provision for forfeiture is quasi criminal in nature and the court will frown at the decision to forfeit if procedural safeguards and compliance are not adhered to in the strict sense. When it relates to landed property, constitutional safeguards must be strictly complied with (see para 10(a)).

(2) In the instant case, it was not in dispute that the respondent had complied with ss 97, 100 and 130 of the NLC. That itself was not sufficient when the plaintiff was wound up. It was necessary to comply with the provision of s 226(3) of the Act failing which it would offend the

fundamental guarantee afforded in the Federal Constitution, in particular art 13(1) (see para 10(b)).

(3) It is well settled that every exercise of statutory power must not only be in conformity with the express words of the statute, in this case, ss 97, 100 and 130 of the NLC but above all, must also comply with certain expressed and/or implied legal requirements and in the instant case, s 226(3) of the Act and must pass the acid test of reasonableness (see para 10(c)).

[Bahasa Malaysia summary

Perkara di dalam kes ini adalah berkait kepada rayuan kepada Mahkamah Tinggi di bawah s 418 of the Kanun Tanah Negara ('KTN') terhadap keputusan responden untuk melucuthak tanah perayu-perayu / plaintif-plaintif. Tidak dipertikaikan bahawa: (a) perayu telah digulung pada 12 April 2007; (b) likuidator persendirian dilantik untuk menguruskan hal ehwal syarikat; (c) likuidator telah memohon untuk bayaran ansuran tetapi gagal untuk menyelesaikan jumlah yang harus dibayar atas terma yang dipersetujui seperti yang ditetapkan oleh defendan; dan (d) Borang 8A berkenaan pemberitahuan perlucuthakan telah *diwartakan*. Alasan utama pembelaan responden di hadapan Mahkamah Tinggi adalah bahawa likuidator gagal untuk mematuhi s 233(3) Akta Syarikat 1965 ('Akta'). Responden akhirnya berhujah bahawa ia bukan secara sengaja memungkiri s 226(3) Akta dalam melaksanakan kuasa statutorinya di bawah KTN. Isu di hadapan mahkamah ini adalah sama ada responden boleh melucuthakkan tanah perayu kerana tidak membayar penaksiran sewa apabila pada masa material perlucuthakan, perayu telah digulung di bawah Akta.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah nyata bahawa peruntukan untuk perlucuthakan adalah bersifat jenayah quasi dan mahkamah akan tidak menyebelahi keputusan untuk melucuthak jika pelindung prosedur dan pematuhan tidak dipatuhi dalam erti yang sebenarnya. Apabila ia berkenaan hartanah, pelindung perlembagaan mesti dipatuhi dengan ketat (lihat perenggan 10(a)).

(2) Dalam kes ini, tidak dipertikaikan bahawa responden telah mematuhi ss 97, 100 dan 130 KTN. Ini sahaja tidak mencukupi apabila plaintif digulung. Adalah perlu untuk mematuhi peruntukan s 226(3) Akta jika gagal ia akan menyinggung jaminan asas yang diberikan di dalam Perlembagaan Persekutuan, terutamanya perkara 13(1) (lihat perenggan 10(b)).

(3) Adalah ditetapkan bahawa setiap pelaksanaan kuasa statutori bukan sahaja selaras dengan kata-kata nyata statut, dalam kes ini, ss 97, 100 dan 130 KTN tetapi di atas semuanya sekali, mesti juga mematuhi keperluan

undang-undang yang nyata dan/atau tersirat tertentu dan dalam kes ini, s 226(3) Akta dan mesti lulus ujian 'asid munasabah' (lihat perenggan 10(c)).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals [2002] 2 MLJ 1, FC (folld)

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1, CA (refd)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35, FC (refd)

Legislation referred to

Companies Act 1965 ss 226(3), 233(3)
Federal Constitution art 13, 13(1)
National Land Code ss 97, 100, 130, 418, Form 8A

Appeal from: Suit No MT-25–73 of 2010 (High Court, Johor Bharu)

Mohd Syazmin bin Mohd Soffian (Syed Paul & Co) for the appellant.
Shahrizal bin Shaari (Federal Counsel, Johor State Legal Advisor Office) for the respondent.

Hamid Sultan J (delivering judgment of the court):

[1] We heard the appellant/plaintiff's appeal on 5 December 2012 and allowed the appeal with costs. My learned brothers, Datuk Linton Albert and Datuk Wira Mohtarudin bin Baki, have read the judgment in draft form and approved the same. This is our judgment.

[2] The appeal revolves on one main issue as to the question whether the respondent can forfeit the appellant's land for non-payment of rent assessment when at the material time of forfeiture the appellant has been wound up under the Companies Act 1965.

[3] It is the contention of learned counsel for the appellant that once the appellant has been wound up, the respondent cannot proceed to forfeit the appellant's property without obtaining leave of court. And relies on s 226(3) of the Companies Act 1965 ('CA 1965') which states:

226 Actions stayed on winding up order.

(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

[4] Learned counsel also asserts that 'action or proceeding' under s 226(3) of the Companies Act 1965 means a proceeding where the liability is intended to be fastened on the company or its assets. And relies on the Federal Court's decision of *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals* [2002] 2 MLJ 1 where the Federal Court stated:

In our view, it is crucial to examine the word 'proceeding' in tandem with the words 'against the company' in s 226(3) of the Act. In this connection, we are particularly attracted by the observations of the House of Lords in *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 but more significantly, the powerful and well modulated arguments proffered in the Indian case of *Rahmat Ali Fatehullah v Calcutta National Bank Ltd* AIR 1955 All 169 … The words 'against the company' must mean a proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself.

BRIEF FACTS

[5] The facts of the case have been well articulated by the learned judicial commissioner in his grounds of judgment. The subject matter relates to an appeal to the High Court under s 418 of the National Land Code ('NLC'), against the decision of the respondent to forfeit the plaintiff's land, by way of 'Notice of Reversion to the State, Form 8A dated 23.6.2010'.

[6] It is not in dispute that: (a) the plaintiff was wound up on 12 April 2007; (b) a private liquidator was appointed to manage the affairs of the company; (c) the liquidator had applied for instalment payments but failed to settle the amount due on the agreed terms as stipulated by the defendant; (d) Form 8A concerning notification of the forfeiture was duly *gazetted* on 23 June 2010.

[7] The principal ground of defence of the respondent before the High Court was that the liquidator had failed to comply with s 233(3) of the CA 1965 which states:

233 Custody and vesting of company's property.

(3) Where an order is made under this section every liquidator of a company in relation to which the order is made shall lodge within seven days of the making of the order —

(a) an office copy of the order with the Registrar; and

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(b) where the order relates to land, an office copy of the order with the appropriate authority concerned with the registration or recording of dealings in that land,

and every liquidator who makes default in complying with this section shall be guilty of an offence against this Act.

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[8] In consequence, the respondent argues that it had not intentionally breached s 226(3) of the CA 1965 in exercising its statutory powers under the NLC.

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[9] Upon hearing the arguments the learned judicial commissioner concluded as follows:

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Having considered the grounds raised by both parties in support of their respective case, I held that under the circumstances of this case, P could not invoke the purported non-compliance by D of s 226(3) of the CA as a valid ground of appeal under s 418 of the NLC. The order appealed against was made in the exercise of powers conferred by the NLC. P itself breached its legal obligations under the CA and was, therefore, not in a position to ask that the order of D be set aside as D had proceeded to make the order without being officially notified that P had by then been wound up. I, therefore, found no merit in this appeal and dismissed with costs.

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[10] We have read the appeal record and submission of the parties in detail. We are grateful to the comprehensive submission of both learned counsel. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned federal counsel, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

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(a) it is trite that provision for forfeiture is quasi criminal in nature and court will frown at the decision to forfeit if procedural safeguards and compliance are not adhered to in the strict sense. When it relates to landed property, constitutional safeguards must be strictly complied with (see art 13 of the Federal Constitution; *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1);

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(b) in the instant case, it is not in dispute that the respondent has complied with ss 97, 100 and 130 of the NLC. That itself is not sufficient when the plaintiff is wound up. It is necessary to comply with the provision of s 226(3) of the CA 1965 failing which it will offend the fundamental guarantee afforded in the Federal Constitution in particular art 13(1) which reads as follows:

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13 Rights to property.

(1) No person shall be deprived of property save in accordance with law.

(c) it is well settled that every exercise of statutory power must not only be in

conformity with the express words of the statute in this case, ss 97, 100 and 130 of the NLC, but above all must also comply with certain express and/or implied legal requirements and in the instant case, s 226(3) of the CA 1965 and must pass the acid test of reasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35).

[11] For reasons stated above, the appeal is allowed with costs of RM10,000. The decision of the High Court is set aside. The order of forfeiture is revoked. Deposit to be refunded to the appellant.

[12] We hereby order so.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed